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No. 06-694

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL WILLIAMS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Section 2252A(a)(3)(B) of Title 18 of the United States Code (Supp. IV 2004) prohibits "knowingly * * * advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing] * * * any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material" is illegal child pornography.

The question presented is whether Section 2252A(a)(3)(B) is overly broad and impermissibly vague, and thus facially unconstitutional.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 444 F.3d 1286. The opinion and order of the district court (Pet. App. 46a-69a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2006. A petition for rehearing was denied on July 17, 2006 (Pet. App. 70a-71a). On October 6, 2006, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including November 14, 2006. On November 6, 2006, Justice Thomas further extended the time to December 14, 2006. The petition for a writ of certiorari was filed on November 17, 2006, and granted on March 26, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in the appendix. App., *infra*, 1a-15a.

STATEMENT

Following the entry of a guilty plea in the United States District Court for the Southern District of Florida, respondent was convicted of one count of knowingly advertising, promoting, and presenting material "in a manner that reflects the belief, or that is intended to cause another to believe," that the material contains illegal child pornography, in violation of 18 U.S.C. 2252A(a)(3)(B) (Supp. IV 2004), and one count of possession of computer disks that contained images of child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) (Supp. IV 2004). He was sentenced to 60 months of imprisonment on each count, to run concurrently, to be followed by two years of supervised release. The court of appeals reversed respondent's conviction on the Section 2252A(a)(3)(B) count, holding that the provision was overbroad and impermissibly vague, and therefore facially unconstitutional. Pet. App. 1a-45a.

1. a. Congress enacted 18 U.S.C. 2252A(a)(3)(B) in the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act). Section 2252A(a)(3)(B) provides, in pertinent part, that anyone who knowingly "advertises, promotes, presents, distributes, or solicits * * * any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material" contains illegal child pornography (*i.e.*, "an obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual

depiction of an actual minor engaging in sexually explicit conduct") commits a criminal offense. 18 U.S.C. 2252A(a)(3)(B)(i) and (ii) (Supp. IV 2004).[1]

Congress passed Section 2252A(a)(3)(B) in the wake of *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002). In *Free Speech Coalition*, the Court held unconstitutional two provisions that expanded the definition of illegal child pornography, both of which were enacted in the Child Pornography Prevention Act of 1996 (CPPA), Pub. L. No. 104-208, 110 Stat. 3009-26. One provision, 18 U.S.C. 2256(8)(B), defined "child pornography" to include a visual depiction that "is, or appears to be," of a minor engaging in sexually explicit conduct. The second provision, 18 U.S.C. 2256(8)(D), defined "child pornography" to include a visual depiction "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." The Court held that those provisions were substantially overbroad in violation of the First Amendment because they "proscribe[d] a significant universe of speech that is neither obscene under *Miller* [v. *California*, 413 U.S. 15 (1973)] nor child pornography under [*New York* v. *Ferber*, 458 U.S. 747 (1982)]." *Free Speech Coal.*, 535 U.S. at 240; see *id.* at 256-258. The Court explained that non-obscene depictions of sexually explicit conduct could be banned consistent with the First Amendment only if they involved real children, because only the need to protect real children from sexual abuse could justify dispensing with the re-

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[1] Unless otherwise noted, all reference to 18 U.S.C. 2252A(a)(3)(B) is to the Supp. IV 2004 edition.

quirement that material be shown to be obscene before it can be prohibited. *Id.* at 256.

With respect to Section 2256(8)(D), the pandering provision, the Court noted that it "punishe[d] even those possessors who took no part in pandering." *Free Speech Coal.*, 535 U.S. at 242-243. Thus, "[m]aterial[] falling within the proscription [was] tainted and unlawful in the hands of all who receive[d] it, though they b[ore] no responsibility for how it was marketed, sold, or described." *Id.* at 258. See *ibid.* (provision not only prohibits pandering but also prohibits "possession of material described, or pandered, as child pornography by someone earlier in the distribution chain").

In response to *Free Speech Coalition*, Congress passed the PROTECT Act, aimed at revising those portions of the CPPA that this Court found unconstitutional to comply with "the limitations established by that decision." S. Rep. No. 2, 108th Cong., 1st Sess. 6 (2003). As particularly relevant here, Congress repealed Section 2256(8)(D), which had defined child pornography to include a visual depiction that had been pandered as such. In its stead, Congress added a new section, codified at 18 U.S.C. 2252A(a)(3)(B), targeting the act of pandering and solicitation itself by "criminaliz[ing] offers to buy, sell or trade anything that is purported to depict actual or obscene child pornography." *Id.* at 10. Congress recognized that the "internet has provided a ready forum for those who wish to traffic in child pornography," and it sought to "check this rapidly growing market." *Ibid.*

Congress stressed that the provision was "written narrowly." S. Rep. No. 2, *supra*, at 10. As Congress explained, "[t]he crux of what this provision bans is the offer to transact in this unprotected material, coupled

with proof of the offender's specific intent." *Id.* at 12. Congress further explicated:

> [F]or example, this provision prohibits an individual from offering to distribute anything that he specifically intends to cause a recipient to believe would be actual or obscene child pornography. It likewise prohibits an individual from soliciting what he believes to be actual or obscene child pornography.

H.R. Conf. Rep. No. 66, 108th Cong., 1st Sess. 61 (2003). Congress made clear that "no actual materials need exist; the government establishes a violation with proof of the communication and requisite specific intent." *Id.* at 61-62. That is so because "even fraudulent offers to buy or sell unprotected child pornography help to sustain the illegal market for this material." *Id.* at 62.

b. Congress made 15 legislative findings that explain the reasons for the provisions of Section 501 in the PROTECT Act. Pub. L. No. 108-21, 117 Stat. 676.[2] In those statutory findings, Congress emphasized that the government has a "compelling interest" in the continued enforceability and effectiveness of its prohibitions against child pornography, and that "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." § 501(3), 117 Stat. 676 (quoting *Ferber*, 458 U.S. at 760).

Congress found that child pornography "results from the abuse of real children by sex offenders." § 501(12), 117 Stat. 678. More specifically, Congress found that

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[2] The congressional findings are reproduced in the notes to 18 U.S.C. 2251 (Supp. IV 2004) and in the appendix to the brief (App., *infra*, 11a-15a).

there was "no substantial evidence that any of the child pornography images being trafficked today were made other than by the abuse of real children." § 501(7), 117 Stat. 677. In addition, Congress found "that technology already exists to disguise depictions of real children to make them unidentifiable and to make depictions of real children appear computer-generated." § 501(5), 117 Stat. 676. Congress found, however, that, since this Court's decision in *Free Speech Coalition*, "defendants in child pornography cases have almost universally raised the contention that the images in question could be virtual, thereby requiring the government, in nearly every child pornography prosecution, to find proof that the child is real." § 501(10), 117 Stat. 677.

Congress outlined the difficulties of proof in this area, including that "[c]hild pornography circulating on the Internet has, by definition, been digitally uploaded or scanned into computers and has been transferred over the Internet, often in different file formats, from trafficker to trafficker." § 501(8), 117 Stat. 677. Congress further found that "[t]he number of prosecutions being brought has been significantly and adversely affected as the resources required to be dedicated to each child pornography case now are significantly higher than ever before." § 501(10), 117 Stat. 677. Congress noted that *Ferber* had driven child pornography from the shelves of adult bookstores, and concluded that congressional action was necessary in order "to ensure that open and notorious trafficking in such materials does not reappear, and even increase, on the Internet." § 501(15), 117 Stat. 678.

2. On April 26, 2004, a federal agent logged into an Internet chat room on Yahoo! entitled "per ten's action

uncensored:1."[3] Based on the title of the chat room and the messages posted in it, the agent recognized it as one dedicated to child pornography. The agent saw a public message (*i.e.*, a message that anyone in the chat room could see on his computer), from someone with the sexually graphic screen name (*i.e.*, pseudonym) "Twatjuicesucker2004," which was later traced to respondent. Respondent's public message stated: "Dad of toddler has 'good' pics of her an [sic] me for swap of your toddler pics, or live cam." Pet. App. 2a; J.A. 22-23.

The agent engaged respondent in a private Internet chat. During that chat, respondent stated that his daughter was two years old and that he had nude photographs of her. Respondent also told the agent that he had engaged in sexual activity with an 11-month-old child and that he had nude photographs of his daughter "in folder on puter." Presentence Investigation Report para. 6 (PSR); Br. in Opp. 4.

Using Yahoo!'s file transfer system, respondent and the agent swapped non-pornographic photographs. Pet. App. 2a; PSR para. 7. Following the photograph exchange, respondent claimed that he had sexually explicit photographs of his young daughter, stating: "I've got hc [hard core] pictures of me and dau, and other guys eating her out—do you??" Pet. App. 2a. When respondent asked the agent for additional pictures and none was forthcoming, respondent accused the agent of being a cop. The agent answered by accusing respondent of being a cop. After repeating these accusations in the public part of the chat room, respondent posted a message stating: "HERE ROOM; I CAN PUT UPLINK CUZ

[3] Although the plea transcript indicates that the title of the chat room has an "s" on the word "action," J.A. 22, that is a mistranscription. Presentence Investigation Report para. 6; Br. in Opp. 3.

IM FOR REAL—SHE CANT." The message was immediately followed by a computer hyperlink that contained, among other things, seven images of actual minors, approximately five to 15 years old. The children in the images were nude and were displaying their genitals, engaging in sexually explicit conduct, or both. *Id.* at 2a-3a; J.A. 23.[4]

3. After reserving the right to challenge the constitutionality of Section 2252A(a)(3)(B), respondent pleaded guilty to both counts in the indictment. Pet. App. 47a; J.A. 19-25. The district court denied respondent's motion to dismiss the Section 2252A(a)(3)(B) count based on the claim that the provision was unconstitutionally overbroad and vague. Pet. App. 46a-69a. The district court concluded that the statute "only imposes criminal liability upon an individual who not only has the intent to, but also creates the context which would cause another to believe the material he or she is trying to promote contains obscenity or actual child pornography." *Id.* at 65a. The court noted that the statute "does not criminalize mere possession," but rather prohibits "the pandering in material which is not protected by the First Amendment." *Ibid.*

4. The court of appeals reversed in relevant part. Pet. App. 1a-45a.

a. The court of appeals recognized that subsections (i) and (ii) of Section 2252A(a)(3)(B) "capture perfectly what remains clearly restrictable child pornogra-

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[4] A subsequent search of respondent's trailer resulted in the seizure of two computer hard drives that held at least 22 images of actual minors engaged in sexually explicit conduct or lascivious display of genitalia. Most of the images depicted prepubescent children, as well as sado-masochistic conduct or other depictions of pain. Pet. App. 3a; J.A. 15-16, 22; PSR para. 14.

phy under pre- and post-*Free Speech Coalition* Supreme Court jurisprudence: obscene simulations of minors engaged in sexually explicit conduct and depictions of actual minors engaged in same." Pet. App. 19a. The court further acknowledged that "[t]he materials touted by [respondent] in this case were clearly illegal child pornography." See *id.* at 21a n.54; *id.* at 18a (noting that "the materials [respondent] possessed were unquestionably depictions of 'real' children"). And the court did not question the "extraordinary importance" of protecting "children against sexual abuse and predatory pedophiles" and the need for "strong federal laws" to address that governmental interest. *Id.* at 6a.

The court noted that Congress "remedie[d] the problem" identified by *Free Speech Coalition* of "penalizing individuals farther down the distribution chain for possessing images that, despite how they were marketed, are not illegal child pornography." Pet. App. 16a. As the court explained, Congress accomplished this "[b]y moving the pandering provision from the definitions section to a stand-alone status, and using language that targets only the act of pandering." *Ibid.* The court also noted that Congress "beef[ed] up its findings" on the increased prosecutorial difficulties caused by the "ready availability" of technology that can make pictures of real children unidentifiable or appear to be computer-generated. *Id.* at 17a.

b. Nevertheless, the court of appeals held that Section 2252A(a)(3)(B) was facially unconstitutional on overbreadth and vagueness grounds. Pet. App. 37a, 42a, 44a. In addressing respondent's overbreadth challenge, the court noted that Section 2252A(a)(3)(B) would likely pass constitutional muster "[i]f all that the pandering provision stood for was that individuals may not com-

mercially offer or solicit illegal child pornography nor falsely advertise non-obscene material as though it were." *Id.* at 20a-21a. This was so, the court concluded, because "the First Amendment allows the absolute prohibition of both truthful advertising of an illegal product and false advertising of any product." *Id.* at 21a. Because the court believed, however, that Section 2252A(a)(3)(B) is "not limited to commercial exploitation" but encompasses non-commercial speech as well, the court went on to consider whether "the restriction on such non-commercial speech is constitutionally overbroad." *Id.* at 22a.

In so doing, the court reasoned that Section 2252A(a)(3)(B) was "problematic" for three reasons. Pet. App. 22a. First, because the "pandered child pornography need only be 'purported'" to be covered by the statute, the court was concerned that the statute sweeps in material that either does not in fact exist or that does not satisfy the legal definition of child pornography. *Ibid.* Second, in the court's view, the provision bans protected speech in the form of "the description or advocacy of illegal acts" in circumstances that do not rise to the level of "immediate incitement." *Id.* at 23a & n.58. Third, the court found "particularly objectionable the criminalization of speech that 'reflects the belief' that materials" are illegal child pornography because, in the court's view, the provision punishes "a defendant's beliefs that simulated depictions of children are real or that innocent depictions of children are salacious." *Id.* at 26a. As the court understood Section 2252A(a)(3)(B), the requirement of the intent to traffic in illegal pornography "only applies to one portion of the provision—promoting material in a manner 'that is intended to cause another to believe' it is illicit." *Id.* at 35a.

Accordingly, the court concluded that Section 2252A(a)(3)(B) "abridges the freedom to engage in a substantial amount of lawful speech in relation to its legitimate sweep," and held that it was unconstitutionally overbroad. Pet. App. 36a-37a.

c. With respect to respondent's vagueness argument, the court was concerned that, because Section 2252A(a)(3)(B) requires neither that the pandered material depict real children nor "that any 'purported' material * * * actually exist," and because the court read the "reflects the belief" portion of the statute as having "no intent requirement," the government could establish a violation of the provision with proof of any communication deemed "reflective of perverse thought." Pet. App. 39a-40a. The court further concluded that "the determination of what constitutes presentation in a 'manner that is intended to cause another to believe' that material contains illegal child pornography," was "[e]ven more complex." *Id.* at 40a. In the court's view, the provision could capture an email entitled "Good pics of kids in bed" sent by a grandparent, with innocent pictures attached of grandchildren in pajamas. *Ibid.*

SUMMARY OF ARGUMENT

Congress constitutionally prohibited offers to provide, or solicitations to receive, material that purports to be unprotected child pornography. Section 2252A(a)(3)(B) represents Congress's effort to remedy the constitutional problems in the pandered-materials provision struck down in *Free Speech Coalition*. Congress found that offers to provide or solicitations to receive what purports to be child pornography fuel the market for such material, thus causing harm to real chil-

dren. Nothing in the Constitution prevents Congress from seeking to suppress such conduct.

I. Section 2252A(a)(3)(B) is consistent with the First Amendment.

A. The conduct covered by Section 2252A(a)(3)(B) enjoys no First Amendment protection. To the extent that the provision covers commercial offers and solicitations, it clearly implicates no First Amendment interests, because "the First Amendment allows the absolute prohibition of both truthful advertising of an illegal product and false advertising of any product." Pet. App. 21a. The same is true of non-commercial offers or solicitations of unprotected child pornography. Speech offering to provide, or seeking to receive, illegal material has the same low value and the same damaging social consequences, regardless of whether the exchanges are proposed for profit or for free. Just as the government can ban offers to *sell* drugs without infringing the First Amendment, see *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973), so too can it ban offers to give drugs away for free. The same analysis applies to unprotected child pornography.

Congress also has a compelling interest in drying up the market for child pornography and thus removing an incentive to create it. See *New York* v. *Ferber*, 458 U.S. 747 (1982); *Osborne* v. *Ohio*, 495 U.S. 103 (1990). Regulation of even non-commercial solicitations or offers of child pornography furthers that goal, because individuals who offer or solicit what purports to be child pornography create the appearance of demand or supply, and thereby fuel the market for such material. Such communications also facilitate exchanges. Traffic in contraband can only occur if purveyors or consumers can signal each other that the items are available and desired.

In the underground child-pornography market, where much of the material is traded or exchanged through clandestine networks or postings in chat rooms, communications that alert others to the existence of the material, or the desire to acquire it, are vital links in its dissemination.

Congress thus may legitimately take aim at such communications as a direct means of suppressing the production and circulation of child pornography. Nothing in this Court's jurisprudence precludes that action. The imminent-incitement test of *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam), applies to limitations on "mere advocacy" or speech that has a "mere tendency" to encourage unlawful activity, but the offers, promotions, and solicitations covered by Section 2252A(a)(B)(3) are not such speech. Nor are speakers protected because their offers or solicitations of child pornography may be false, or based on misconceptions about the nature of the material at issue. Intentional false offers of or solicitations for contraband enjoy no constitutional protection. Likewise, communications reflecting a "deluded belief" that the materials involve real child pornography, Pet. App. 23a, are not constitutionally protected. The statute does not punish mere "thoughts," *id.* at 26a, but applies only when an objectively reasonable person would conclude from the context that the speaker is offering or seeking real child pornography. In addition, the speaker subjectively must know that the material is represented in that manner, and either have the belief that the material was child pornography or intend to cause another person to have that belief. Even if a speaker is wrong about the nature of the material, speech that objectively purports to offer real child pornography threatens the evils that Congress

sought to forestall, and the mental-state elements of the offense protect against unwitting violations of the statute.

B. Even if Section 2252A(a)(3)(B) could be construed to reach some protected speech, it is not substantially overbroad. A statute is not facially overbroad unless its application to protected speech is not only real, but substantial in relation to the law's legitimate sweep. The court of appeals made no effort to apply that test. Instead of seeking to quantify the legitimate applications of the law and compare them to invalid applications, the court relied on a few abstract hypotheticals (none of which involved mainstream media, artistic endeavors, or realistic scenarios) to conclude that the law is overbroad. The statute primarily applies, however, to cases like this one, in which the unprotected nature of the speech is beyond dispute. And even if narrow circumstances could be imagined in which the statute would reach protected speech, the remedy would be an as-applied challenge rather than the radical step of facially invalidating the law.

II. Section 2252A(a)(3)(B) is not impermissibly vague. The Due Process Clause requires that a criminal statute give fair warning of its prohibitions and adequately guide the discretion of law enforcement. Properly construed, the provision clearly reaches only its target: pandering or soliciting what purports to be unprotected child pornography. The statute protects against uncertain applications by requiring that the "manner" of any offer or solicitation objectively reflect the belief, or the intention to cause another to believe, that the materials at issue are proscribable child pornography. And the definition of the covered materials

precisely tracks this Court's description of proscribable child pornography.

To the extent that the Court rejects respondent's overbreadth claim, it should also reject any effort to invalidate the statute on its face on grounds of purported vagueness as to others. The statute clearly covers respondent's statements and gives law enforcement adequate guidance on that point. But even looking beyond respondent's conduct, the court of appeals' fears of vagueness rest on hypotheticals that fall outside of Section 2252A(a)(3)(B). Section 2252A(a)(3)(B) takes a statement's context fully into account, and it thus does not ensnare innocent and unwary speakers.

ARGUMENT

CONGRESS'S PROHIBITION OF OFFERING OR SOLICITING WHAT PURPORTS TO BE UNPROTECTED CHILD PORNOGRAPHY IS CONSTITUTIONAL

Congress unquestionably has the power to proscribe offers or solicitations to transact in illegal narcotics or other contraband. Nothing in the First Amendment restricts that authority, even though such offers or solicitations take the form of speech, because offers and solicitations of illegal products are not protected by the First Amendment. Nor are misleading offers of material purported to be contraband protected by the First Amendment. Congress may forbid offers and solicitations of what purports to be illegal child pornography to suppress the illegal child-pornography market and protect the children who are harmed by its production and circulation.

I. SECTION 2252A(a)(3)(B) CAPTURES NO PROTECTED SPEECH AND, IN ANY EVENT, IS NOT OVERBROAD

Section 2252A(a)(3)(B) reaches a person who knowingly "advertises, promotes, presents, distributes, or solicits" real child pornography or purportedly real child pornography. As Congress explained, the statute "bans the offer to transact in unprotected material." H.R. Conf. Rep. No. 66, *supra*, at 61; see S. Rep. No. 2, *supra*, at 12. It "criminalizes offers to buy, sell or trade anything that is purported to depict actual or obscene child pornography." *Id.* at 10.

The court of appeals recognized that subsections (i) and (ii) of Section 2252A(a)(3)(B) "capture perfectly what remains clearly restrictable child pornography under pre- and post-*Free Speech Coalition* Supreme Court jurisprudence," Pet. App. 19a, specifically, "an obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual depiction of an actual minor engaging in sexually explicit conduct." 18 U.S.C. 2252A(a)(3)(B)(i) and (ii). The court also observed (Pet. App. 16a) that the PROTECT Act cured the "primary objection" to the pandering provision struck down as overbroad by this Court in *Free Speech Coalition*. The provision at issue there imposed criminal penalties on anyone who possessed materials "described, or pandered, as child pornography by someone earlier in the distribution chain." *Ashcroft* v. *Free Speech Coal.*, 535 U.S. 234, 258 (2002). Section 2252A(a)(3)(B), by contrast, "targets only the act of pandering" and therefore fully "remedies the problem" of penalizing downstream possession. Pet. App. 16a. As suggested by this Court in *Free Speech Coalition*, Section 2252A(a)(3)(B) applies only to those who "bear responsibility for how [materials

are] marketed, sold, or described" by doing no "more than prohibit[ing] pandering." 535 U.S. at 258.

Properly understood, Congress's prohibition against pandering and solicitation of what purports to be contraband is constitutional. Such acts are wholly unprotected under the First Amendment. And even if Section 2252A(a)(3)(B) did reach some instances of protected speech, respondent cannot demonstrate, and the court of appeals did not find, that the statute is substantially overbroad in relation to its plainly legitimate sweep.

A. Section 2252A(a)(3)(B) Reaches No Constitutionally Protected Speech

1. Offers or solicitations to sell, buy, or barter contraband—whether true or false—are unprotected by the First Amendment

The court of appeals recognized that Section 2252A(a)(3)(B) would likely be constitutional "[i]f all that the pandering provision stood for was that individuals may not commercially offer or solicit illegal child pornography nor falsely advertise non-obscene material as though it were." Pet. App. 20a-21a. The court observed that "the First Amendment allows the absolute prohibition of both truthful advertising of an illegal product and false advertising of any product." *Id.* at 21a. That observation is unquestionably correct.

This Court has repeatedly held that speech that proposes an illegal commercial transaction falls entirely outside the scope of First Amendment protection. See, *e.g.*, *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 497 n.7 (1996) (plurality opinion) ("[T]he First Amendment does not protect commercial speech about unlawful activities."); *Zauderer* v. *Office of Disciplinary Counsel of the Sup. Ct.*, 471 U.S. 626, 638 (1985) ("The States and

the Federal Government are free to prevent the dissemination of commercial speech * * * that proposes an illegal transaction."); *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 563-564 (1980); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976) (*Virginia Pharmacy*).[5]

Likewise, as the court of appeals concluded (Pet. App. 21a), "false, deceptive, or misleading commercial speech may be banned." *Ibanez* v. *Florida Dep't of Bus. & Prof'l Reg.*, 512 U.S. 136, 142 (1994); see, *e.g.*, *Zauderer*, 471 U.S. at 638 ("The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading."); *Virginia Pharmacy*, 425 U.S. at 771; *Konigsberg* v. *State Bar*, 366 U.S. 36, 49 & n.10 (1961). Surely, the authority to ban such false or deceptive speech is at its zenith when the representation involves a false claim that material is contraband.

2. Non-commercial efforts to solicit, to distribute, or to offer to distribute illegal contraband are similarly unprotected by the First Amendment

a. As the court of appeals recognized (Pet. App. 22a), Section 2252A(a)(3)(B) is not limited to commercial

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[5] This Court has defined commercial speech as speech that does "no more than propose a commercial transaction," *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (quoting *Virginia Pharmacy*, 425 U.S. at 762), or as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson*, 447 U.S. at 561. Speech proposing a barter or trade fits comfortably within either definition.

speech; it also reaches non-commercial solicitation, distribution, or offers to provide child pornography. But the fact that a transaction involving contraband is non-commercial does not entitle the speech proposing it to First Amendment protection. It is the *illegal* nature of the contraband offered or sought, not the commercial nature of the transaction, that makes such proposals unprotected under the First Amendment. "A direct solicitation of unlawful activity may of course be proscribed, whether or not it is commercial in nature." *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 579 (2001) (Thomas, J., concurring).

In *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), the Court rejected a First Amendment challenge to an ordinance that forbade newspapers from carrying "help-wanted" advertisements in gender-designated columns where such gender discrimination constituted an unlawful employment practice. *Id.* at 389. Although the newspaper contended that "the exchange of information * * * in the commercial realm" warranted the full protection of the First Amendment, *id.* at 388, the Court stated that, "[w]hatever the merits of this contention may be in other contexts," the want-ads in question were not protected because they proposed an illegal transaction. *Id.* at 388-389. The Court explained that "[d]iscrimination in employment is not only commercial activity, it is *illegal* commercial activity." *Id.* at 388. The Court expressed "no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes." *Ibid.* Likewise, the Court observed that the result would be the same "if the nature of the transaction were indicated by placement under columns captioned 'Narcotics for Sale' and

'Prostitutes Wanted' rather than stated within the four corners of the advertisement." *Ibid.*

The reasoning in *Pittsburgh Press* is not limited to the commercial context; rather, it accords with the common sense notion that speech proposing illegal activity can be just as injurious if offered for free as if offered for profit. Just as an advertisement offering to sell narcotics can be banned, *Pittsburgh Press*, 413 U.S. at 388, so too can an advertisement offering to give narcotics away gratis. Each inflicts comparable social evils (*e.g.*, the spread of illegal drugs), and the purpose of regulating the underlying activity does not focus on its commercial character. See *Virginia Pharmacy*, 425 U.S. at 759 (observing that *Pittsburgh Press* turned not on the commercial nature of the speech, but on the ground that "the discriminatory hirings proposed by the advertisements, and by their newspaper layout, were themselves illegal").

A constitutional rule that immunized non-commercial offers to engage in criminal activity would contradict this Court's longstanding recognition that speech that has violation of the law as its "sole immediate object" is not protected by the First Amendment. *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). It is hard to imagine a more immediate criminal object than the offering of or solicitation for materials that cannot be legally possessed. And it certainly makes no difference that the act of non-commercial offering or soliciting involves speech. A wide range of criminal offenses, including solicitation, conspiracy, and aiding and abetting, involve speech. Yet the courts have never questioned the government's power to regulate such speech. See *Brown* v. *Hartlage*, 456 U.S. 45, 55 (1982) ("[W]hile a solicitation to enter into an agreement arguably crosses

the sometimes hazy line distinguishing conduct from pure speech, such a solicitation, even though it may have an impact in the political arena, remains in essence an invitation to engage in an illegal exchange for private profit, and may be properly prohibited."); *Konigsberg*, 366 U.S. at 50 & n.10 (observing that "solicitation of crime" is "outside the scope of constitutional protection"); *United States* v. *Freeman*, 761 F.2d 549, 552 (9th Cir. 1985) (Kennedy, J.) ("[W]here speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone."), cert. denied, 476 U.S. 1120 (1986).

This Court in *Free Speech Coalition* thought it obvious that "[t]he Government, of course, may * * * enforce criminal penalties for unlawful solicitation." 535 U.S. at 251-252. The Court made that observation not in the context of a transaction for profit, but in discussing permissible ways to address adults who might seduce children. *Ibid.* That principle directly supports Congress's regulatory authority to ban solicitations or promotions of material that, as represented, is unlawful to possess.

b. Non-commercial offers to provide or solicitations to obtain child pornography can also be regulated consistent with the First Amendment because such offers and solicitations, no less than their commercial analogs, contribute to the nationwide market for child pornography and fuel the creation of more child pornography through the abuse of children. Congress can ban such speech as a permissible means of drying up the market for child pornography and thus eliminating a major incentive for its creation.

This Court's decision in *New York* v. *Ferber*, 458 U.S. 747 (1982), recognized that the compelling interest in

suppressing the market for child pornography justifies the imposition of criminal penalties on those who promote that material, for profit or otherwise. That case involved a facial challenge to a New York statute that made it a crime to "promote" non-obscene child pornography and that defined "promote" to mean, *inter alia*, to "sell, give, provide, lend, * * * distribute, * * * present, * * * or advertise, or to offer or agree to do the same." *Id.* at 751 (quoting N.Y. Penal Law § 263.00(5) (McKinney 1980)). This Court rejected that challenge, noting that "the production of pornographic materials is a low-profile, clandestine industry," in which "the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled." 458 U.S. at 759-760. The Court concluded that the legislature was justified in believing that it would be "difficult, if not impossible, to halt the exploitation of children by pursuing only those who produce the photographs and movies." *Ibid.* Thus, "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." *Id.* at 760. The Court upheld the statute even though it covered, *inter alia*, someone who "give[s]" child pornography away or "offer[s]" to do so.

For similar reasons, the Court upheld a criminal ban on the possession and viewing of child pornography in *Osborne* v. *Ohio*, 495 U.S. 103 (1990). That ban was based on the State's desire "to protect the victims of child pornography" by "destroy[ing] the market for the exploitative use of children." *Id.* at 109. The Court observed that, "since the time of [its] decision in *Ferber*,

much of the child pornography market has been driven underground." *Id.* at 110. The Court concluded that the statute was a permissible attempt to "decreas[e] demand" for child pornography and "to stamp out this vice at all levels in the distribution chain." *Ibid.*

Similarly here, an individual who solicits child pornography provides a spur to its creation, whether or not the solicitation includes a promise of payment. Requests for free samples frequently precede sales of pornographic material.[6] Non-commercial solicitations of child pornography also create an incentive for producers of "homemade" child pornography who do not intend to sell their product.[7] Likewise, offers of child pornography fuel the market, whether or not they include a request for payment. Non-commercial offers serve to introduce the product to new consumers and to generate interest. Non-commercial transactions also prompt the wider circulation of already existing child pornography.

Thus, unlike virtual child pornography, which the Court in *Free Speech Coalition* concluded was "not 'intrinsically related' to the sexual abuse of children," 535 U.S. at 250, the offers and solicitations at issue here directly fuel the market for real child pornography. The possibility that some of the material offered may not be correctly described does not prevent the offers from stoking the demand. This fueling of the market results in the very harms to children recognized by this Court

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[6] See *United States* v. *Gnavi*, 474 F.3d 532, 534 (8th Cir. 2007) (defendant responded to an undercover agent's offer of a catalogue of videos containing child pornography by requesting "any sample videos/pics" and stating that "[a]nything would be appreciated").

[7] See *United States* v. *Tagore*, 158 F.3d 1124, 1127 (10th Cir. 1998) (defendant organized a secret chat room to which members submitted "homemade" child pornography).

in *Ferber* and *Osborne*: the sexual exploitation and abuse of children, and the exacerbation of that abuse by the circulation of a permanent record of it. See *Ferber*, 458 U.S. at 758-759; *Osborne*, 495 U.S. at 109-110, 111. Because of the necessity of suppressing the market in order to protect children, such non-commercial offers to transact in illegal material should be held wholly unprotected by the First Amendment. Accordingly, to the extent Section 2252A(a)(3)(B) bans such offers and solicitations, it infringes no First Amendment right.

3. *The imminent-incitement test of* Brandenburg *v.* Ohio *does not apply to regulations of direct offers to provide, or solicitations to receive, illegal contraband*

a. The court of appeals apparently believed that the government could not regulate *non-commercial* solicitation or distribution of, or offers to distribute, illegal contraband except "under the narrow circumstances * * * of immediate incitement." Pet. App. 23a & n.58 (citing, *inter alia*, *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam)). That is incorrect, because the imminent-incitement requirement of *Brandenburg* does not apply to the type of speech at issue here. Section 2252A(a)(3)(B) does not address efforts to advocate viewing child pornography, but only efforts to solicit or provide such contraband.

In *Brandenburg*, a leader of a Ku Klux Klan group was convicted under a state syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform." 395 U.S. at 444-445 (quoting Ohio Rev. Code Ann. § 2923.13). The defendant's conviction was based on two speeches, in one of which he stated, *inter alia*:

"We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken." *Id.* at 446. This Court reversed, holding that a statute that "purports to punish mere advocacy" of illegal action to effect political or industrial reform, and "to forbid, on pain of criminal punishment, assembly with others merely to advocate" such action could not constitutionally be proscribed in the absence of "incitement to imminent lawless action." *Id.* at 448-449.

This Court has since recognized that the legislature may proscribe direct offers to engage in illegal transactions without meeting an imminent-incitement requirement, because such offers involve neither mere advocacy nor the "mere tendency * * * to encourage unlawful acts." *Free Speech Coal.*, 535 U.S. at 253. Advocacy of illegal conduct may be a form of political speech, and the government's authority to restrict such speech comes into play only when it tends to spark an immediate response. Otherwise, the remedy is more speech. But in *Free Speech Coalition*, the Court contrasted the type of speech covered in *Brandenburg* with speech that has a "significantly stronger, more direct connection" to "illegal conduct," such as "attempt, incitement, solicitation, or conspiracy." 535 U.S. at 253-254. Such speech simply proposes (or constitutes) a violation of the law. See *Freeman*, 761 F.2d at 551-552 (distinguishing between "abstract generality, remote from advice to commit a specific criminal act" for which *Brandenburg* must be satisfied, and "soliciting or counseling a violation of the law" for which "the First Amendment is quite irrelevant if the intent of the actor and the objective meaning of the words used are so close in time and purpose to a sub-

stantive evil as to become part of the ultimate crime itself").

If, as the court of appeals seemed to believe (Pet. App. 23a & n.58), there really were no room under the First Amendment for regulation of non-commercial offers to engage in criminal activity apart from satisfying *Brandenburg*'s imminent-incitement test, virtually all criminal statutes outlawing criminal solicitation would be unconstitutional because they do not impose limits on the immediacy and likelihood of the completed crime, nor do they require a commercial component.[8] As the Fourth Circuit has explained, "to understand the Court [in *Brandenburg*] as addressing itself to speech other than advocacy would be to ascribe to it an intent to revolutionize the criminal law, in a several paragraph *per curiam* opinion, by subjecting prosecutions to the demands of *Brandenburg*'s 'imminence' and 'likelihood' requirements whenever the predicate conduct takes, in whole or in part, the form of speech." *Rice* v. *Paladin Enters., Inc.*, 128 F.3d 233, 265 (1997), cert. denied, 523 U.S. 1074 (1998). Solicitation can be prohibited even in circumstances in which the acceptance that is a prerequisite for the underlying crime is quite unlikely. Indeed, a person can commit criminal solicitation where the proposed crime is not only unlikely, but also factually im-

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[8] See, *e.g.*, Model Penal Code § 5.02(1) (1985) ("A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime."); 18 U.S.C. 373(a) (imposing criminal liability on any person who "solicits, commands, induces, or otherwise endeavors to persuade" another to commit a felony crime of violence "with intent that another person engage in conduct constituting" the crime).

possible. See, *e.g.*, 2 Wayne R. LaFave, *Substantive Criminal Law* § 11.1(d), at 201 (2d ed. 2003).

b. The court of appeals also believed (Pet. App. 22a-23a & n.58) that *Brandenburg* applied because it apparently concluded that Congress's inclusion of the term "promotes" in the statutory prohibition reaches advocacy. That is wrong because whatever the scope of that term standing alone, the use of "promotes" in Section 2252A(a)(3)(B) does not sweep in the type of speech covered in *Brandenburg*.

Under the interpretive canon *noscitur a sociis*, "[a] word is known by the company it keeps." *Dolan* v. *USPS*, 546 U.S. 481, 486 (2006); see *Dole* v. *United Steelworkers*, 494 U.S. 26, 36 (1990) ("[W]ords grouped in a list should be given related meaning."). Here, the surrounding terms—"advertises, * * * presents, distributes, [and] solicits"—when used in conjunction with an item, encompass only direct offers to send, or attempts to obtain, real or purported contraband. See *Webster's Third New International Dictionary* 31 (1961) (*Webster's Third*) (to "advertise" an item means "to call public attention to [it] esp. by emphasizing desirable qualities so as to arouse a desire to buy or patronize"); *id.* at 1793 (to "present" an item means "to lay or put before a person for acceptance: offer as a gift"); *id.* at 660 (to "distribute" means "to give out or deliver" or "to market (a commodity) under a franchise"); *id.* at 2169 (to "solicit" means "to endeavor to obtain by asking or pleading"). In context, the term "promotes" is most naturally read as having a comparable meaning.

When "promote" is used in conjunction with a product, it commonly means "to present (merchandise) for public acceptance through advertising and publicity." *Webster's Third* 1815; accord *Random House Dic-*

tionary of the English Language 1548 (2d ed. 1987) (to "promote" means "to encourage the sales, acceptance, etc., of (a product), esp. through advertising or other publicity"). That is plainly its meaning in Section 2252A(a)(3)(B). To read "promote" in this context to encompass abstract advocacy would improperly "ascrib[e] to one word a meaning so broad that it is inconsistent with its accompanying words." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995).

In addition, to the extent that there is any doubt on this score, the narrower interpretation of "promotes" must be adopted to avoid any constitutional concerns. See, *e.g.*, *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 397 (1988) ("It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld."); *Ferber*, 458 U.S. at 769 n.24 ("When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction.") (citing, *inter alia*, *Crowell* v. *Benson*, 285 U.S. 22, 62-63 (1932)). The term "promotes" has a well-known pedigree in laws aimed at eliminating the market for child pornography, see *Ferber*, 458 U.S. at 751, and this Court has never construed it in this context as prohibiting abstract advocacy.

4. Direct proposals to provide or to receive contraband do not gain First Amendment protection simply because the materials are false, fraudulent, or nonexistent

The court of appeals believed that the statute sweeps in protected speech because the statute applies to "pro-

motion, presentation, distribution, and solicitation" of materials, "even when the touted materials are clean or non-existent." Pet. App. 22a. The court expressed concern that "any promoter—be they a braggart, exaggerator, or outright liar—who claims to have illegal child pornography materials" violates Section 2252A(a)(3)(B), "even if what he or she actually has is a video of 'Our Gang,' a dirty handkerchief, or an empty pocket." *Id.* at 22a-23a.

Section 2252A(a)(3)(B) does capture liars, braggarts, and exaggerators, but only if they directly offer to provide material that is purported to be illegal child pornography.[9] That poses no constitutional problem because such statements, even if not backed up by real (or any) illegal child pornography, are not entitled to First Amendment protection.

a. The liars, braggarts, and exaggerators who fall within the scope of Section 2252A(a)(3)(B) are not engaged in protected speech. False or deceptive statements of fact have "no constitutional value," and "belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (quoting *Chaplinsky* v.

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[9] The court of appeals' concern with materials that purport to be child pornography, but that in fact are not, has salience only for the offering side of the transaction, and not for solicitations. While it might be theoretically possible to solicit material that purports to be child pornography, in reality, solicitations will be for child pornography. The statute, of course, precludes a defense based on a claim that the material actually received was not real child pornography, even though it was marketed as such.

New Hampshire, 315 U.S. 568, 572 (1942)); see *Herbert* v. *Lando*, 441 U.S. 153, 171 (1979). "Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Gertz*, 418 U.S. at 340 (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964)). Indeed, knowingly false claims by liars, braggarts, and exaggerators offering or seeking real child pornography are proscribable even under the speech-protective standard of *New York Times* v. *Sullivan*. See 376 U.S. at 279-280; see also *Garrison* v. *Louisiana*, 379 U.S. 64, 75 (1964).

The court of appeals was thus mistaken in believing that the government may regulate false or deceptive speech only in a traditional commercial setting involving a lawful product. Pet. App. 21a. This Court's precedents make clear that "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake." *Virginia Pharmacy*, 425 U.S. at 771. There is no First Amendment value in speech that peddles innocent or nonexistent material as illegal child pornography.

b. Efforts to solicit real child pornography, especially if the solicitations are left unfulfilled, create an incentive for greater production of real child pornography by making clear that a ready market awaits.[10] Congress may regulate the demand side of this illegal market by prohibiting child-pornography solicitations, even if the material ultimately supplied is not actual child pornography, in an effort to "stamp out this vice at all

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[10] See *United States* v. *Meiners*, No. 06-30389, 2007 WL 1462239, at *2 (9th Cir. May 21, 2007) (per curiam) ("By advertising his desire to receive and trade child pornography, [the defendant] directly encouraged the production and distribution of material that is created by abusing children.").

levels in the distribution chain." *Osborne*, 495 U.S. at 110. Similarly, offers to provide a "purported" illegal product directly stimulate the market for that product, even if the supplier has only counterfeit goods or does not intend to deliver anything. Left unpunished and allowed to proliferate, false offers to provide contraband also consume valuable law enforcement resources, making it easier for genuine traffickers to market their products. Indeed, it would be strange to hold that the First Amendment permits Congress to prohibit "a want ad proposing a sale of narcotics or soliciting prostitutes," *Pittsburgh Press*, 413 U.S. at 388, but disables Congress from prohibiting the same want ad if the speaker in fact possesses only counterfeit narcotics, or does not actually intend to hire a prostitute.

Congress made express legislative findings about the need to prohibit pandering and solicitation as a key element of its effort to eliminate the market in child pornography. In contrast to the legislative findings in *Free Speech Coalition*, which this Court noted were "silent on the evils posed by images simply pandered" as child pornography, 535 U.S. at 257, the legislative findings here emphasize the government's compelling interest in "dry[ing] up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." Pub. L. No. 108-21, § 501(3), 117 Stat. 676 (quoting *Ferber*, 458 U.S. at 760). Congress explained that "even fraudulent offers to buy or sell unprotected child pornography help to sustain the illegal market for this material." H.R. Conf. Rep. No. 66, *supra*, at 62.

5. Any mistaken speech captured by Section 2252A(a)(3)(B), properly construed, is wholly unprotected

The court of appeals found Section 2252A(a)(3)(B) "particularly objectionable" because it believed that the provision would ensnare those whose offers or solicitations "reflect[] the deluded belief" that the materials offered or sought contain real child pornography. Pet. App. 23a-24a. It thus concluded that the statute criminalizes speech "reflecting the deluded belief" that "nonpornographic depictions of children[,] such as commercially produced images of children in clothing catalogs, television, cinema, newspapers, and magazines," are sexually arousing. *Id.* at 25a. The court perceived this aspect of the statute as tantamount to criminalizing "thoughts conjured up by those legal materials." *Id.* at 26a. That concern is unfounded, and it springs from the court's fundamental misinterpretation of Section 2252A(a)(3)(B), which gave the provision a broader reading than its language warrants. Although the statute, properly construed, does capture some speech by mistaken actors, that speech is not constitutionally protected.

a. Contrary to the court of appeals' conclusion that "the 'reflects the belief' portion of the statute has no intent requirement," Pet. App. 39a-40a, Section 2252A(a)(3)(B) in fact has both objective and subjective intent components. As to the objective component: to violate Section 2252A(a)(3)(B), a person must advertise, promote, present, distribute, or solicit material "*in a manner* that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains" illegal child pornography. 18

U.S.C. 2252A(a)(3)(B) (emphasis added). The structure of the sentence makes clear that the words "in a manner" modify both subsequent clauses: "that reflects the belief" and "that is intended to cause another to believe." The words "in a manner" thus provide an objective benchmark for both clauses—a reasonable person must conclude from the language and context of the communication (its "manner") either (1) that the speaker has the "belief" that the proposed transaction will involve illegal child pornography, or (2) that the communication is "intended to cause another to believe" that the proposed transaction will involve illegal child pornography.

Further, the statute has two subjective components. First, the statute requires a showing that the speaker had "the belief" or "intended to cause another to believe" that the material was proscribable child pornography. Those are subjective showings that establish that the speaker intended to traffic, or to purport to be trafficking, in real child pornography, regardless of whether he actually had or could have received such materials. See H.R. Conf. Rep. No. 66, *supra*, at 61-62; S. Rep. No. 2, *supra*, at 12.[11]

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[11] In addition, to avoid constitutional doubt, the "reflects the belief" portion of the statute could be construed to apply only where the defendant solicits materials, while the "intended to cause another to believe" portion of the statute could be construed to apply only where the defendant advertises, promotes, presents, or distributes materials. See *American Booksellers Ass'n*, 484 U.S. at 397; *Ferber*, 458 U.S. at 769 n.24. The legislative history suggests that Congress understood the provision to operate in precisely that fashion. See S. Rep. No. 2, *supra*, at 10 (the government "must prove that the defendant specifically believed (as a *buyer*), or intended to cause another to believe (as a *seller*), that the proffered material depicted either: (1) actual children

Second, the statute applies only to statements made "knowingly." 18 U.S.C. 2252A(a)(3). That scienter requirement applies to each element of the pandering offense set forth in subsection (a)(3)(B), including the manner of communication. See *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) (interpreting the word "knowingly" in a child pornography statute to extend beyond the transportation or receipt element to encompass knowledge of "the sexually explicit nature of the material and [of] the age of the performers"). While, as a matter of grammar, the word "knowingly" could be read to apply *only* to the immediately following clause ("advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing] * * * any material or purported material"), as in *X-Citement Video*, that limitation of the scienter element could engender unnecessary constitutional concerns. See *id.* at 68-69, 71, 78. The mental element "knowingly" must therefore travel down the statute to encompass knowledge of the "manner" in which material is represented. Thus, as the district court recognized (Pet. App. 65a), to violate the provision, a defendant must know that a reasonable person would interpret his words, in context, as referring to real child pornography, regardless of whether any illegal material is actually available.

b. The court of appeals also erred in construing the statute as imposing criminal liability based merely on the defendant's subjective belief that the materials are sexually arousing. Pet. App. 25a (stating that the "reflects the belief" portion of the statute "shifts the focus" to "the perverted but privately held belief that materials

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engaged in sexually explicit conduct; or (2) sexually explicit conduct involving minors that was obscene") (emphases added).

are lascivious"). It would not be enough for the defendant subjectively to believe that the material is lascivious. Rather, the defendant must offer to transact in material "in a manner that reflects the belief" that the material contains either "(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or (ii) a visual depiction of an actual minor engaging in sexually explicit conduct." 18 U.S.C. 2252A(a)(3)(B)(i) and (ii). Section 2256(2)(A) in turn defines "sexually explicit conduct" for these purposes as actual or simulated sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or "lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. 2256(2)(A)(v) (Supp. IV 2004). The term "lascivious" modifies the phrase "exhibition of the genitals or pubic area." Thus, where liability is predicated on the "lascivious" prong of the definition of "sexually explicit conduct," the manner of the defendant's communication must reflect a belief that the material offered or sought actually depicts a minor engaged in "exhibition of the genitals or pubic area," and that the exhibition is "lascivious." 18 U.S.C. 2256(2)(A)(v).[12]

c. Accordingly, although in some circumstances, Section 2252A(a)(3)(B) may capture communications that reflect the mistaken or "deluded" belief that the material offered or sought is illegal child pornography, liability does not turn strictly on the speaker's personal belief that the material (or purported material) is sexually arousing. Rather, liability attaches only if the

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[12] As the court of appeals recognized, the meaning of "lascivious exhibition" is well-established in the law. Pet. App. 24a n.62. Indeed, in *X-Citement Video*, this Court upheld the same definition in the face of a vagueness and overbreadth challenge. *X-Citement Video*, 513 U.S. at 78-79 (discussing 18 U.S.C. 2256 (1994)).

speaker has advertised, promoted, presented, distributed, or solicited materials "in a manner" that a reasonable jury concludes "reflects the belief" that the materials were real child pornography, as defined by the relevant provisions, and the defendant knew and intended that his speech had that character.

Mistaken speech of this character, no less than intentionally false speech, is wholly unprotected because it fuels the market for child pornography, for the reasons explained above. See pp. 30-31, *supra*. It creates the impression that a supply of or demand for real child pornography exists, and thus leads to the abuse of children. For this reason, the government may ban it.

Moreover, offers to provide or solicitations to receive material under the genuine, but mistaken, belief that the transaction will involve real child pornography may be punished as an inchoate form of an offer to transact in contraband, tantamount to attempt or conspiracy.[13] If it were otherwise, targets in a sting who seek to obtain contraband or illegal services from an undercover agent would be protected by the First Amendment, because the target would be operating under the mistaken belief that the agent will provide him with contraband or illegal services. Thus, anyone who solicits sex, attempts to hire a hit man, or seeks illegal child pornography from an undercover officer would have a First Amendment

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[13] The court of appeals stated, without citation, that "mere talk" cannot constitute a "substantial movement toward completing [a] crime," as required for inchoate offenses under "Supreme Court First Amendment jurisprudence." Pet. App. 36a. It is well-established, however, that words alone may serve as "an act sufficient for criminal liability." 1 LaFave, *supra*, § 6.1(b), at 424. Indeed, some crimes are frequently committed through "mere talk," including inchoate crimes like solicitation and conspiracy. *Ibid.*

defense. Here, for example, respondent sought to trade real child pornography with the undercover agent, on the mistaken belief that the undercover agent would provide such material. Such an attempted illegal transaction, even if based on a mistake, finds no haven in the First Amendment.

6. Section 2252A(a)(3)(B) proscribes no protected speech

As the court of appeals recognized (Pet. App. 16a-18a), Section 2252A(a)(3)(B) "targets only the act of pandering" or soliciting depictions that are, as represented, constitutionally unprotected. There is no per se protection for pandering. Indeed, pandering itself can support the conclusion that materials are constitutionally unprotected. See *Ginzburg* v. *United States*, 383 U.S. 463 (1966). The statute does nothing more than prohibit direct offers to provide, or solicitations to obtain, contraband. Congress unquestionably has the power to proscribe such speech, which has a "proximate link to the crime from which it came." *Free Speech Coal.*, 535 U.S. at 250. Unlike the prohibition of virtual child pornography at issue in *Free Speech Coalition*, for which the Court concluded that any causal link to child abuse was too attenuated, the speech proposing a transaction in illegal child pornography here has a direct link to the market for such horrific and damaging materials, with the repeatedly recognized attendant risk of fueling child abuse.

Section 2252A(a)(3)(B) thus serves the same compelling governmental interests relied on by this Court in *Ferber* and *Osborne*. Congress made express legislative findings that the speech at issue is an integral part of the market for child pornography. As Congress's findings demonstrate, offers and solicitations stimulate the

market for child pornography, thereby resulting in children being abused to produce child pornography to supply the demand for that material.

Congress emphasized that the government has a "compelling interest" in the continued enforceability and effectiveness of its prohibitions against child pornography, § 501(3), 117 Stat. 676, the production of which "results from the abuse of real children by sex offenders." § 501(12), 117 Stat. 678. Congress found that "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." § 501(3), 117 Stat. 676 (quoting *Ferber*, 458 U.S. at 760). Congress further found that *Ferber* had driven child pornography from the shelves of adult bookstores, and concluded that congressional action was necessary in order "to ensure that open and notorious trafficking in such materials does not reappear, and even increase, on the Internet." § 501(15), 117 Stat. 678. Respondent's conduct in this case illustrates the type of offers and solicitations Congress sought to capture. See pp. 6-8, *supra*. The First Amendment does not shield such direct offers and solicitations of contraband.

B. Section 2252A(a)(3)(B) Is Not Overbroad In Relation To Its Plainly Legitimate Sweep

Even if Section 2252A(a)(3)(B) reached some actual instances of protected speech, "that assumption would not 'justify prohibiting all enforcement' of the law unless its application to protected speech is substantial, 'not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications.'" *McConnell* v. *FEC*, 540 U.S. 93, 207 (2003) (quoting *Virginia* v.

Hicks, 539 U.S. 113, 119-120 (2003)). Certainly nothing in this record would justify such a conclusion, and the court of appeals did not even undertake the appropriate analysis to quantify and compare the supposed protected applications with the proscribable ones.

A party bringing a facial challenge, even one under the First Amendment, "bears the burden of demonstrating" a statute's unconstitutional overbreadth. *Hicks*, 539 U.S. at 122. To meet that burden, it is not enough to show some overbreadth. Rather, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973). This is so because "there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law." *Hicks*, 539 U.S. at 119. As this Court has explained, "there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct." *Ibid.* This Court has thus required that "a law's application to protected speech be 'substantial,' * * * relative to the scope of the law's plainly legitimate applications, before applying the 'strong medicine' of overbreadth invalidation." *Id.* at 119-120 (citation omitted).

Respondent did not make the requisite showing "'from the text of [the law] and from actual fact,' that substantial overbreadth exists." See *Hicks*, 539 U.S. at 122 (brackets in original) (citing *New York State Club Ass'n* v. *City of New York*, 487 U.S. 1, 14 (1988)). As for the plainly legitimate sweep of the statute, the court of appeals acknowledged (Pet. App. 21a-22a) that Section 2252A(a)(3)(B) clearly covers substantial quantities of

unprotected speech, including *all* commercial offers or solicitations for illegal child pornography, regardless of whether the offerors actually have any illegal child pornography. *Id.* at 34a. But the court improperly limited the "commercial context" by excluding situations in which child pornography is "exchanged," Pet. App. 29a, 34a, and it provided no explanation why barter should be treated differently for constitutional purposes from sale.[14]

Even if some non-commercial applications of the statute posed constitutional problems, the court of appeals did not attempt to quantify the extent to which these areas of concern might actually exist or, more importantly, how these areas of potential application of the statute compare with the statute's legitimate sweep. Instead, the court's conclusion (Pet. App. 36a) that the statute was overbroad, and therefore facially invalid, turned principally on the court's reliance on a few hypothetical scenarios.

As an initial matter, it is hard to fathom how the types of isolated scenarios given by the court—persons falsely or mistakenly claiming to possess child pornogra-

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[14] Courts have recognized the commercial nature of exchanging or trading in child pornography, holding that such transactions qualify as distributions "for pecuniary gain" within the meaning of U.S. Sentencing Guidelines § 2G2.2, comment. (n.1) (1999). See *United States* v. *Williams*, 253 F.3d 789, 795-796 (4th Cir. 2001); *United States* v. *Laney*, 189 F.3d 954, 961 (9th Cir. 1999); *United States* v. *Black*, 116 F.3d 198, 202-203 (7th Cir.), cert. denied, 522 U.S. 934 (1997). Since 2000, the Guidelines have expressly provided for an enhanced sentence not only where the defendant distributed child pornography "for pecuniary gain," but also where the defendant distributed child pornography "for the receipt, or expectation of receipt, of a thing of value," including "other child pornographic material." Guidelines § 2G2.2, comment. (n.1) (2006); *id.* § 2G2.2(b)(3)(A) and (B).

phy, the possession of which is itself a crime (Pet. App. 22a-26a)—could ever be substantial in comparison with the heartland of conduct prohibited by Section 2252A(a)(3)(B): speech offering or soliciting fully proscribable child pornography. Indeed, it is difficult to imagine how Section 2252A(a)(3)(B)'s prohibition of speech offering or soliciting such illegal material poses any realistic threat to actual instances of protected speech.

Unlike the statutory definitions of child pornography whose implications for mainstream literature and movies depicting teenage sexual activity concerned this Court in *Free Speech Coalition*, 535 U.S. at 247-248, 257, Section 2252A(a)(3)(B) could not ensnare promotions of *Romeo and Juliet* or mainstream movies such as *American Beauty* and *Traffic*. Nor did Congress so intend. As Congress observed, "the producers of movies like *American Beauty* and *Traffic* do not intend for viewers to believe that real children are actually engaging in sexual activity." S. Rep. No. 2, *supra*, at 10 n.6. Accordingly, "[i]n no way could such movie producers satisfy the specific intent required by this provision." *Ibid.*[15]

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[15] The court of appeals expressed concern that "a person offering for sale a copy of Disney's Snow White on false claims that it contains depictions of minors engaged in sexually explicit conduct" would violate the statute. Pet. App. 21a. But that hypothetical, by referring simply to "false claims," ignores what the content of an advertisement would have to contain to be covered by the terms of the statute. If a person did offer *Snow White* in a manner that would fall within the statute —for example, by suggesting that a real little girl is raped in the video —that would and should be captured by the statute. Persons responding to such an offer would be seeking a video of a little girl being raped and, as Congress found, such offers and responses fuel the market for child pornography and result in more children being sexually abused.

In any event, the court's reliance on a few hypothetical scenarios does not substitute for a proper overbreadth analysis. "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Overbreadth analysis requires "realistic" threats to protected speech, not imagined ones. *Id.* at 801.[16] The court of appeals did not identify realistic threats here, let alone find them substantial compared to the statute's legitimate scope.

To the extent that Section 2252A(a)(3)(B) sweeps within its ambit protected speech, any such application can be avoided through case-by-case adjudication. *Hicks*, 539 U.S. at 124; *Ferber*, 458 U.S. at 773-774. As this Court recently observed, "[a]s-applied challenges are the basic building blocks of constitutional adjudication." *Gonzales* v. *Carhart*, 127 S. Ct. 1610, 1639 (2007) (quoting Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1328 (2000)). Respondent makes no claim that his conduct is not covered by the statute's terms, and there is no need for the draconian remedy of declar-

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The statute could reach such pandering whether the video actually delivered was Disney's *Snow White* or a blank video.

[16] See, *e.g.*, *Gibson* v. *Mayor & Council of City of Wilmington*, 355 F.3d 215, 226-227 (3d Cir. 2004) (finding the scenarios advanced by the challenger "more than slightly unrealistic" and holding that "the number and weight of permissible applications far outweigh the possible invalid applications, if not in number, then certainly in kind"); *J&B Entm't, Inc.* v. *City of Jackson*, 152 F.3d 362, 366-367 (5th Cir. 1998) (rejecting an overbreadth challenge where the court could "imagine[]" that the public-nudity ordinance would have banned a nude production of *Hair* or a nude reading by novelist John Grisham, but "these examples, in comparison to its legitimate sweep, are not substantial").

ing the statute facially invalid. See *Ayotte* v. *Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) ("[W]e try not to nullify more of a legislature's work than is necessary, for we know that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" (quoting *Regan* v. *Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion))).

II. SECTION 2252A(a)(3)(B) IS NOT IMPERMISSIBLY VAGUE

The court below also erred in concluding that Section 2252A(a)(3)(B) is impermissibly vague. Pet. App. 37a-42a. To survive a vagueness challenge, a statute must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). The Constitution, however, does not impose "impossible standards of clarity," *Kolender* v. *Lawson*, 461 U.S. 352, 361 (1983) (internal quotation marks and citation omitted), nor does it require "mathematical certainty" from statutory language, *Grayned*, 408 U.S. at 110. Instead, a statute is not vague if it is "clear what the [statute] as a whole prohibits." *Ibid.* "[S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications." *Hill* v. *Colorado*, 530 U.S. 703, 733 (2000) (internal quotation marks and citation omitted). Moreover, in the context of a federal statute, federal courts have a duty, if it is fairly possible, to construe the statute to provide clarity and to avoid unconstitutional vagueness. See, *e.g.*, *X-Citement Video, Inc.*, 513 U.S. at 69; *Dennis* v. *United States*, 341 U.S. 494, 501-502 (1951).

The court of appeals' vagueness concerns stemmed from its misunderstanding of the scope of the statute, particularly the statute's intent requirement. See pp. 32-35, *supra*. Properly construed, the statute is not impermissibly vague. Rather, as the district court concluded, Section 2252A(a)(3)(B) "prohibits exactly what it was intended to prohibit, the pandering in material which is not protected by the First Amendment." Pet. App. 65a. The statute "only imposes criminal liability upon an individual who not only has the intent to, but also creates the context which would cause another to believe the material he or she is trying to promote contains obscenity or actual child pornography." *Ibid.* In short, it is not a statute that "simply has *no* core," *Smith* v. *Goguen*, 415 U.S. 566, 578 (1974), but is a statute with a readily understandable and constitutionally unproblematic center.

Significantly, the court of appeals made no attempt to demonstrate that any of its purported vagueness concerns pertained to the conduct of respondent. Nor could respondent plausibly claim that the statute was vague as applied to his own speech. Respondent logged onto a web site dedicated to child pornography using the pseudonym "Twatjuicesucker2004," and sent out a public message stating: "Dad of toddler has 'good' pics of her an [sic] me for swap of your toddler pics, or live cam." He subsequently posted a link that contained illegal child pornography, along with a message announcing that he could do so because he was "FOR REAL." Pet. App. 2a-3a; J.A. 22-23. If this Court rejects respondent's overbreadth challenge, that should be the end of respondent's facial vagueness challenge. A law that does not chill a substantial amount of protected speech should not be facially invalidated on the theory that it

might be vague in some applications, notwithstanding its legitimate, comprehensible core. As this Court has explained, "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Hoffman Estates*, 455 U.S. at 495; see *Kolender*, 461 U.S. at 358 n.8.[17] Here, respondent had fair notice that his statements fell well within the scope of the prohibition of Section 2252A(a)(3)(B). And the text of the law adequately guides the discretion of law enforcement officers in cases like this.

In any event, the statute is not vague as to other speakers either. In reaching the contrary conclusion, the court of appeals relied on hypothetical examples. Pet. App. 39a-41a. The court posited "an email claiming that the attached photographs depict "little Janie in the bath—hubba, hubba!" *Id.* at 39a. The court erroneously believed that "[s]ince the 'reflects the belief' portion of the statute has no intent requirement, the government establishes a violation with proof of a communication

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[17] A vagueness challenge can be a component of an overbreadth claim because a court considering overbreadth "should evaluate the ambiguous as well as the unambiguous scope of the enactment." *Hoffman Estates*, 455 U.S. at 494 n.6. But the reverse is also true: when a court has concluded that a statute's legitimate applications greatly outnumber any arguably illegitimate ones, marginal vagueness concerns that have no relevance to a particular defendant should not justify total (*i.e.*, facial) invalidation of a statute. Indeed, *Hoffman Estates* indicates that other than the role vagueness concerns may play in the overbreadth analysis, vagueness does not provide for the same exception to third-party standing limitations as the overbreadth doctrine, and respondent has no standing to assert vagueness concerns that may arise in insubstantial numbers at the periphery of the statute to other defendants. Respondent's conduct lay at the clearly prohibited core of the statute, and that is fatal to *his* vagueness claim.

that it deems, with virtually unbounded discretion, to be reflective of perverse thought." *Id.* at 39a-40a. The court also imagined three possible senders of "an email entitled simply 'Good pics of kids in bed'"—"a proud and computer-savvy grandparent," "a chronic forwarder of cute photos with racy tongue-in-cheek subject lines," and "a convicted child molester who hopes to trade for more graphic photos with like-minded recipients." *Id.* at 40a. Because the court of appeals believed that "[t]he pandering provision is devoid of any contextual parameters" and did not provide for any inquiry into the nature of the underlying images, it suggested that all three senders might be subject to prosecution. *Id.* at 40a-41a.

It is not true, however, that Section 2252A(a)(3)(B) is "devoid of any contextual parameters." As explained (see pp. 32-35, *supra*), all elements of the provision —including the "reflects the belief" and "intended to cause another to believe" clauses—include both objective and subjective intent requirements. Those objective and subjective requirements protect against improper applications of the law and give it the requisite clarity.

The court of appeals was thus incorrect in thinking that criminal liability would attach based on the hypothetical email subject line "little Janie in the bath—hubba hubba!" Pet. App. 39a. A reasonable person could not conclude from the language of that email alone that the speaker believes that he is offering illegal child pornography or that the speaker intends his recipients to so conclude. Nothing about the "little Janie" message suggests that the photograph contains an "exhibition of the genitals or pubic area," 18 U.S.C. 2256(2)(A)(v), or that it includes a photograph meeting any of the other relevant definitions of "sexually explicit conduct." 18 U.S.C. 2256(2)(A). Even assuming that the words "in

the bath" indicate that the photograph depicts nudity, it is well-established that nudity alone does not qualify as sexually explicit conduct. See *United States* v. *Amirault*, 173 F.3d 28, 33 (1st Cir. 1999); *United States* v. *Villard*, 885 F.2d 117, 124 (3d Cir. 1989). Furthermore, nothing in the hypothetical suggests that the speaker subjectively understands that a reasonable person would construe his statement as referring to real child pornography, or that the speaker believes or intends to cause others to believe that it is proscribable child pornography. Therefore, without more—such as other emails sent by the speaker giving context to understand who is referred to by "little Janie" and what is meant by "hubba, hubba"—the court of appeals' hypothetical clearly would not be covered by the statute.

Similarly, with respect to the email entitled "Good pics of kids in bed," the email title alone would be insufficient to trigger coverage under the statute. And nothing about the additional context hypothesized by the court of appeals with respect to the grandparent or chronic forwarder would ensnare those senders, as there is no indication that either sender actually believes, or intends others to believe, that the "kids" depicted in the photographs are engaged in sexually explicit conduct. Nor could either sender be shown to have known that the message would be understood as referring to illicit child pornography. The third sender (the convicted child molester who intended to exchange prohibited images of child pornography) might fall within the confines of the statute, but it would depend on the rest of the facts of the particular case.

Under this statute, context is key, and as this case demonstrates, context both disposes of clever hypothetical cases and makes clear real-life cases. Here, respon-

dent engaged in his speech in a chat room dedicated explicitly to the trading and discussion of child pornography and child sexual abuse. If the grandparents posted their "Good pics of kids in bed" link in such a room, especially after a "chat" like respondent had with the undercover agent with a user name like respondent's, they could rightfully be prosecuted because the manner of that communication would express an intent that the recipient believe that the pictures are pornographic. But if "Good pics of kids in bed" was merely the subject line of an email that the grandparents sent to their close friends and children, that would clearly fall outside the statutory prohibition. Similarly, if the "pics" were posted on the grandparents' personal website, surrounded by family pictures at Disney World, there would be no evidence of a belief that the pictures were child pornography or that others were intended to believe that they were.

Finally, the court of appeals expressed concern that its hypothetical email titles could subject persons to prosecution regardless of whether the attached photographs were innocuous or "whether *any* photos are attached," Pet. App. 40a, and it suggested that this vests law enforcement with too much discretion, *id.* at 41a. This comment loses sight of the fundamental nature of Section 2252A(a)(3)(B). The statute properly reaches concerted efforts to promote materials as real child pornography even if the image or video actually delivered is innocuous or blank. See pp. 29-31, *supra*. In some cases, an innocuous attachment will be highly relevant evidence. But the focus on prohibiting pandering may have its greatest impact in cases in which the attachment is far from innocuous and clearly appears to be actual child pornography, by eliminating the arduous

task of proving that the attachment is as real as the defendant represented it to be. Congress provided the government with a means to prosecute such offers and solicitations, regardless of whether the government can prove that such material is in fact real child pornography or that it even exists, precisely to suppress the child-pornography market that such offers and solicitations fuel.

As both the court of appeals (Pet. App. 17a) and the district court recognized (*id.* at 55a-56a, 67a-68a), Congress made specific legislative findings. In those statutory findings, Congress emphasized the harm to real children that flows from the proliferation of the market for child pornography and that "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." Pub. L. No. 108-21, § 501(3), 117 Stat. 676 (quoting *Ferber*, 458 U.S. at 760). In addition, Congress found that, "[i]n the absence of Congressional action, the difficulties in enforcing the child pornography laws will continue to grow increasingly worse," as "the mere prospect that the technology exists to create composite or computer-generated depictions that are indistinguishable from depictions of real children will allow defendants who possess images of real children to escape prosecution." § 501(13), 117 Stat. 678.

Congress gave prosecutors a variety of tools to achieve its aim, making clear that efforts to stimulate, feed, or capitalize on a market for what purports to be child pornography deserve no sanctuary. Although other provisions address aspects of the problem, see, *e.g.*, 18 U.S.C. 1466A (Supp. IV 2004), 2251(d)(1)(A)

(Supp. IV 2004), this provision is applicable where—as Congress expressly found was a significant issue, see § 501(7)-(14), 117 Stat. 677-678—the government cannot prove that the materials depict actual children.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. The First Amendment to the United States Constitution provides, in part, that "Congress shall make no law * * * abridging the freedom of speech."

2. The Fifth Amendment to the United States Constitution provides, in part, that "[n]o person shall * * * be deprived of life, liberty, or property, without due process of law."

3. 18 U.S.C. 2252A (2000 & Supp. IV 2004) provides:

Certain activities relating to material constituting or containing child pornography

(a) Any person who—

(1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any child pornography;

(2) knowingly receives or distributes—

(A) any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

(3) knowingly—

(A) reproduces any child pornography for distribution through the mails, or in interstate or

foreign commerce by any means, including by computer; or

(B) advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

(ii) a visual depiction of an actual minor engaging in sexually explicit conduct;

(4) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly sells or possesses with the intent to sell any child pornography; or

(B) knowingly sells or possesses with the intent to sell any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

(5) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or

(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

(6) knowingly distributes, offers, sends, or provides to a minor any visual depiction, including any photograph, film, video, picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct—

(A) that has been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer;

(B) that was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer; or

(C) which distribution, offer, sending, or provision is accomplished using the mails or by transmitting or causing to be transmitted any wire communication in interstate or foreign commerce, including by computer,

for purposes of inducing or persuading a minor to participate in any activity that is illegal.[1]

shall be punished as provided in subsection (b).

(b) (1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but, if such person has a prior conviction under this chapter, chapter 71, chapter 109A, chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both, but, if such

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[1] So in original.

person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

(c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) that—

(1)(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and

(B) each such person was an adult at the time the material was produced; or

(2) the alleged child pornography was not produced using any actual minor or minors.

No affirmative defense under subsection (c)(2) shall be available in any prosecution that involves child pornography as described in section 2256(8)(C). A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) unless, within the time provided for filing pretrial motions or at such time prior to trial as the judge may direct, but in no event later than 10 days before the commencement of the trial, the defendant provides the court and the United States with notice of the intent to assert such defense and the substance of any expert or other

specialized testimony or evidence upon which the defendant intends to rely. If the defendant fails to comply with this subsection, the court shall, absent a finding of extraordinary circumstances that prevented timely compliance, prohibit the defendant from asserting such defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) or presenting any evidence for which the defendant has failed to provide proper and timely notice.

(d) AFFIRMATIVE DEFENSE.—It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant—

(1) possessed less than three images of child pornography; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof—

(A) took reasonable steps to destroy each such image; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

(e) ADMISSIBILITY OF EVIDENCE.—On motion of the government, in any prosecution under this chapter or section 1466A, except for good cause shown, the name, address, social security number, or other nonphysical identifying information, other than the age or approximate age, of any minor who is depicted in any child pornography shall not be admissible and may be redacted from any otherwise admissible evidence, and the jury

shall be instructed, upon request of the United States, that it can draw no inference from the absence of such evidence in deciding whether the child pornography depicts an actual minor.

(f) CIVIL REMEDIES.—

(1) IN GENERAL.—Any person aggrieved by reason of the conduct prohibited under subsection (a) or (b) or section 1466A may commence a civil action for the relief set forth in paragraph (2).

(2) RELIEF.—In any action commenced in accordance with paragraph (1), the court may award appropriate relief, including—

(A) temporary, preliminary, or permanent injunctive relief;

(B) compensatory and punitive damages; and

(C) the costs of the civil action and reasonable fees for attorneys and expert witnesses.

4. 18 U.S.C. 2256 (2000 & Supp. IV 2004) provides:

Definitions for chapter

For the purposes of this chapter, the term—

(1) "minor" means any person under the age of eighteen years;

(2)(A) Except as provided in subparagraph (B), "sexually explicit conduct" means actual or simulated—

(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(ii) bestiality;

(iii) masturbation;

(iv) sadistic or masochistic abuse; or

(v) lascivious exhibition of the genitals or pubic area of any person;

(B) For purposes of subsection 8(B)[1] of this section, "sexually explicit conduct" means—

(i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;

(ii) graphic or lascivious simulated;

(I) bestiality;

(II) masturbation; or

(III) sadistic or masochistic abuse; or

(iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) "organization" means a person other than an individual;

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[1] So in original. Probably should be "(8)(B)".

(5) "visual depiction" includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image;

(6) "computer" has the meaning given that term in section 1030 of this title;

(7) "custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained;

(8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

(9) "identifiable minor"—

(A) means a person—

(i)(I) who was a minor at the time the visual depiction was created, adapted, or modified; or

(II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

(ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and

(B) shall not be construed to require proof of the actual identity of the identifiable minor.

(10) "graphic", when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted; and

(11) the term "indistinguishable" used with respect to a depiction, means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.

5. Pub. L. No. 108-21, Tit. V, § 501, 117 Stat. 676 (Apr. 30, 2003), provided:

Congress finds the following:

(1) Obscenity and child pornography are not entitled to protection under the First Amendment under Miller v. California, 413 U.S. 15 (1973) (obscenity), or New York v. Ferber, 458 U.S. 747 (1982) (child pornography) and thus may be prohibited.

(2) The Government has a compelling state interest in protecting children from those who sexually exploit them, including both child molesters and child pornographers. "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance," New York v. Ferber, 458 U.S. 747, 757 (1982), and this interest extends to stamping out the vice of child pornography at all levels in the distribution chain. Osborne v. Ohio, 495 U.S. 103, 110 (1990).

(3) The Government thus has a compelling interest in ensuring that the criminal prohibitions against child pornography remain enforceable and effective. "The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." Ferber, 458 U.S. at 760.

(4) In 1982, when the Supreme Court decided Ferber, the technology did not exist to—

(A) computer generate depictions of children that are indistinguishable from depictions of real children;

(B) use parts of images of real children to create a composite image that is unidentifiable as a particular child and in a way that prevents even an expert from concluding that parts of images of real children were used; or

(C) disguise pictures of real children being abused by making the image look computer-generated.

(5) Evidence submitted to the Congress, including from the National Center for Missing and Exploited Children, demonstrates that technology already exists to disguise depictions of real children to make them unidentifiable and to make depictions of real children appear computer-generated. The technology will soon exist, if it does not already, to computer generate realistic images of children.

(6) The vast majority of child pornography prosecutions today involve images contained on computer hard drives, computer disks, and/or related media.

(7) There is no substantial evidence that any of the child pornography images being trafficked today were made other than by the abuse of real children. Nevertheless, technological advances since Ferber have led many criminal defendants to suggest that the images of child pornography they possess are not those of real children, insisting that the government prove beyond a reasonable doubt that the images are not computer-gen-

erated. Such challenges increased significantly after the decision in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

(8) Child pornography circulating on the Internet has, by definition, been digitally uploaded or scanned into computers and has been transferred over the Internet, often in different file formats, from trafficker to trafficker. An image seized from a collector of child pornography is rarely a first-generation product, and the retransmission of images can alter the image so as to make it difficult for even an expert conclusively to opine that a particular image depicts a real child. If the original image has been scanned from a paper version into a digital format, this task can be even harder since proper forensic assessment may depend on the quality of the image scanned and the tools used to scan it.

(9) The impact of the Free Speech Coalition decision on the Government's ability to prosecute child pornography offenders is already evident. The Ninth Circuit has seen a significant adverse effect on prosecutions since the 1999 Ninth Circuit Court of Appeals decision in Free Speech Coalition. After that decision, prosecutions generally have been brought in the Ninth Circuit only in the most clear-cut cases in which the government can specifically identify the child in the depiction or otherwise identify the origin of the image. This is a fraction of meritorious child pornography cases. The National Center for Missing and Exploited Children testified that, in light of the Supreme Court's affirmation of the Ninth Circuit decision, prosecutors in various parts of the country have expressed concern about the continued

viability of previously indicted cases as well as declined potentially meritorious prosecutions.

(10) Since the Supreme Court's decision in Free Speech Coalition, defendants in child pornography cases have almost universally raised the contention that the images in question could be virtual, thereby requiring the government, in nearly every child pornography prosecution, to find proof that the child is real. Some of these defense efforts have already been successful. In addition, the number of prosecutions being brought has been significantly and adversely affected as the resources required to be dedicated to each child pornography case now are significantly higher than ever before.

(11) Leading experts agree that, to the extent that the technology exists to computer generate realistic images of child pornography, the cost in terms of time, money, and expertise is—and for the foreseeable future will remain—prohibitively expensive. As a result, for the foreseeable future, it will be more cost-effective to produce child pornography using real children. It will not, however, be difficult or expensive to use readily available technology to disguise those depictions of real children to make them unidentifiable or to make them appear computer-generated.

(12) Child pornography results from the abuse of real children by sex offenders; the production of child pornography is a byproduct of, and not the primary reason for, the sexual abuse of children. There is no evidence that the future development of easy and inexpensive means of computer generating realistic images of children would stop or even reduce the sexual abuse of

real children or the practice of visually recording that abuse.

(13) In the absence of congressional action, the difficulties in enforcing the child pornography laws will continue to grow increasingly worse. The mere prospect that the technology exists to create composite or computer-generated depictions that are indistinguishable from depictions of real children will allow defendants who possess images of real children to escape prosecution; for it threatens to create a reasonable doubt in every case of computer images even when a real child was abused. This threatens to render child pornography laws that protect real children unenforceable. Moreover, imposing an additional requirement that the Government prove beyond a reasonable doubt that the defendant knew that the image was in fact a real child—as some courts have done—threatens to result in the de facto legalization of the possession, receipt, and distribution of child pornography for all except the original producers of the material.

(14) To avoid this grave threat to the Government's unquestioned compelling interest in effective enforcement of the child pornography laws that protect real children, a statute must be adopted that prohibits a narrowly-defined subcategory of images.

(15) The Supreme Court's 1982 Ferber v. New York decision holding that child pornography was not protected drove child pornography off the shelves of adult bookstores. Congressional action is necessary now to ensure that open and notorious trafficking in such materials does not reappear, and even increase, on the Internet.